

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 590 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HEIR OF BAROT DANSANG HIRJI

Versus

BAROT KANJI HIRJI

Appearance:

MR PV HATHI, for Petitioners

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 15/07/97

ORAL JUDGEMENT

1. In a suit for partition bearing Civil Suit No. 23 of 1964 the learned Civil Judge (Senior Division), Junagadh by his judgment and order dated 28/2/1966 passed preliminary decree in terms of following order :-

"It is hereby declared, ordered and decreed that the below mentioned properties are liable to be

partitioned between the parties and the plaintiffs get 11/20 share in those properties and the rest go to the defendants :

- (1) Three houses mentioned and described at items nos. 1, 2 and 3 of the list attached with the plaint;
- (2) One piece of agricultural land admeasuring 1 and 1/2 Bighas and described at item No.4 of the aforesaid list;
- (3) The surplus amount, if any, from Rs.3,000/- the sale proceeds of the agricultural land sold by the defendant No.1 and mentioned at item No.5 of the list, after taking accounts of the same from him;
- (4) The moveable properties stated and described in the inventory, Ex. 129 and the house-hold kit and domestic articles in custody and possession of the plaintiffs;
- (5) The Yajmans as referred to in the Yajmanvriti books of the family of the parties;
- (6) The surplus amount, if any, from the sale proceeds Rs.2200/- of cattle sold by the defendant No.1 and mentioned at item No. 10 of the list after taking accounts of the same from him.

Shri C.B. Doshi, an advocate of this Court is appointed as a Commissioner to take inspection and make partition of the aforesaid properties except one piece of agricultural land referred to at item No. 2 of this order. As regards the aforesaid piece of agricultural land, a reference shall be made to the Collector, Junagadh for effecting partition thereof amongst the parties in their above specified shares.

The plaintiffs to deposit into Court Rs.500/- in the first instance for the expenses and remuneration of the Commissioner within three weeks from the date of this order and the learned Commissioner shall submit his report on or before 31/3/1966. The Collector, Junagadh be also requested to submit his report on or before 31/3/1966.

The defendants Nos. 1 and 2 will bear their own costs as well as the costs of the plaintiffs in this suit. The defendants Nos. 3(1), (2), (3) and No.4 are ex-parte and as such, no order as to their costs."

2. The above judgment and preliminary decree were taken in First Appeal No. 138 of 1966 before this Court and a Division Bench of this Court (Coram : M.P. Thakkar and A.N. Surti, JJ.- Per M.P. Thakkar, J. as His Lordship then was) by judgment dated 24/10/1972 modified the aforesaid preliminary decree in following terms :-

"The learned counsel for the appellants has, however, objected to the directions given by the trial Court, in clauses (3), (5) and (6) of the order.

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With regard to clause (3), it has been directed that the appellants shall render accounts of the sale-proceeds of an agricultural land sold when appellant No. 1 was managing the affairs as a Karta. No fraud has been alleged by the plaintiffs. Under the circumstances, it is argued by the learned counsel for the appellants that this direction should not have been given. The learned counsel for the respondents-plaintiffs has conceded that this direction cannot be supported. We accordingly set aside this direction.

Turning now to clause (5), the learned trial Judge has directed that the Yajmans whose names are mentioned in the ancestral book shall be allotted to the respective parties by way of partition. It is a strange direction. The Yajmans cannot be assigned to any of the parties without consulting their wishes. Surely the Yajmans cannot be considered to be a joint family property. Realizing the strange nature of the direction given by the trial court, the learned counsel for the respondents conceded that the said direction also may be set aside. We accordingly direct that the direction contained in clause (5) be set aside.

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It is conceded by the learned counsel for the appellants that in the view we are taking the appellants would be entitled to 11/20th share in the joint family properties.

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Under the circumstances, the decree passed by the trial court must be confirmed in all other respects.

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We accordingly allow the appeal partly to the extent that directions contained in clauses (3), (5) and (6) of the judgment and order of the trial court and the decree under appeal are set aside. Subject to this modification, the appeal fails and is dismissed. Having regard to the facts and the circumstances of the case, there will be no order regarding costs of this appeal."

3. It appears that the Commissioner appointed by the Court proceeded to make the inquiry as directed by the Court and submitted his report with Ex. 226. The plaintiffs did not oppose the Commissioner's report, but the defendants nos. 1 and 2 (the appellants herein) subsequently appeared and filed objections exh. 224. The objections inter-alia were directed against the Commissioner partitioning the moveable property on the basis of the market value and that the proposal to divide the books of Yajmans was not proper. After considering the submissions made on behalf of the rival parties the trial Court passed following order on 6/10/1976 :-

"The three suit houses being not divisible in specified shares be sold by public auction u/sec. 2 of the Partition Act and the sale proceeds should be divided between the parties as per their respective shares. However, the parties shall have priority to purchase all or any of the houses, at the highest bioffered by the parties or stranger. The defendants Nos. 1-2 are ordered to give to the plaintiffs 264 silver coins, the currency notes of Rs.1245/-, the movable property worth Rs.367/-, 33 Kgs. of Silver and 44 tolas of gold-ornaments or in the alternative the amount of Rs. 43,324/- being the value thereof. The plaintiffs are ordered to give to the defendants Nos.1-2 the movable

property worth Rs.1051/- or in the alternative the cash amount of Rs.1051/-. The books of Yajmans be partitioned between the parties as recommended in this report."

As a result of the aforesaid order passed by the learned trial Judge, final judgment and decree dated 30/12/1976 in terms of the said order came to be passed. It is this judgment for final decree, which has been the subject matter of challenge in this appeal u/S. 96 of the Code of Civil Procedure (for short 'CPC').

4. With regard to the value of movables in the sum of Rs.43,324/- the learned trial Judge has specified the amount separately at Rs.367/-, 33 Kgs. of silver and 44 tolas of gold ornaments or in the alternative the amount of Rs.3102/-, Rs.1245/-, Rs.367/-, Rs.19,866/- and Rs.18,744/-. The learned trial Judge has also specified the direction with regard to Yajman books by saying that defendants nos. 1-2 shall give to the plaintiffs Yajman books shown at item Nos.10-12 in the inventory exh. 129, one book out of the two books found from the cup-board and two books out of the five books found from the wooden box in the kitchen and the remaining books should be kept with the defendants nos. 1-2.

5. When this appeal came up for final hearing, the learned advocates for the parties made their submissions. Mr. P.V. Hathi, learned advocate appearing for the appellants made two submissions : (i) in respect of the moveable properties the learned trial Judge ought to have fixed the value of the properties as on the date of the suit and not as on the date of final decree as recommended by the Commissioner, and (ii) the learned trial Judge should not have given any direction with regard to the Yajman books. I have heard Mr. J.R. Nanavati, learned advocate for the respondents on the aforesaid two submissions. Following points for determination, therefore, arise in this appeal :-

- (I) What should be the date of valuation of moveable properties ?
- (II) Whether the books of Yajmans (the names and particulars of Yajmans) could be directed to be divided between the parties ?

I

6. The first point relates to the valuation of the moveables set out by the Commissioner upon inquiry having been held by him as per the preliminary decree and accepted by the learned trial Judge while passing the

final decree. Relying upon the provision contained in Order 20 Rule 10 of the CPC it has been submitted that in so far as partition of moveable properties is concerned, the value thereof should be as on the date of the suit. It would not be necessary to refer to the provision of Order 20 Rule 10 of the CPC for the simple reason that whereas Order 20 Rule 10 refers to decree in respect of moveable property, Order 20 Rule 18 refers to decree in respect of partition of properties, moveable as well as immoveable. Therefore, consideration of Order 20 Rule 10 would be out of question. Rule 18 of Order 20 of the CPC might, therefore, be reproduced :-

"Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, -

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

7. On a plain reading of the aforesaid provision it can be seen that when the decree (in a suit for partition of property) relates to any other immovable property or to movable property (property other than one assessed to the payment of the revenue to the Government) the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a

preliminary decree declaring the rights of the parties in the property and giving further directions as may be required. It would, therefore, be clear from the aforesaid provision that there are different stages of decree/decrees in a partition suit. Obviously there might be a preliminary decree or even more than one preliminary decree, which would determine the shares of the parties, but which would not divide the properties deliverable to the co-sharers. Another stage is one that of passing final decree after inquiry is held as per the direction contained in the preliminary decree. The shares of the parties are determined first at the stage of the preliminary decree. Actual partition is effected as per the final decree. Bearing in mind such a nature of the provision contained in Order 20 Rule 18 quoted hereinabove, it would be premature to decide in the preliminary decree whether property in defendant's possession is available for or capable of partition or not and such a question has necessarily to be left to be decided at the inquiry subsequent to the preliminary decree. It is only when it is found that the property is either not available for partition or the property is not partible the determination of value thereof is required to be made. It is, therefore, clear that such a value cannot be as on the date of the suit. It has necessarily to be as on the date of the final decree. In my opinion, therefore, the submissions canvassed on behalf of the appellants in this respect cannot be accepted and the final decree setting out the valuation of the moveables has got to be upheld.

II

8. Second point relates to the books of Yajmans. It is not in dispute that such books of Yajmans are listed in the inventory exh. 129. It is also not in dispute that the Commissioner made suggestions with regard division of such books. It is clear that the learned trial Judge has accepted the recommendation of the Commissioner by giving the direction as noted hereinabove. Mr. Hathi's submission is that this is clearly contrary to what the Division Bench held. In reply Mr. Nanavati submitted that the books showing particulars of the Yajmans are different from the Yajmans themselves and the direction with regard to partitioning moveable property has not been disturbed by the Division Bench in the appeal against the preliminary decree. However, on a reference to the judgment rendered by the Division Bench of this Court it is clear that the Yajmans could not be divided or assigned to any of the parties without consulting the wishes of the Yajmans. It has been observed that surely the Yajmans cannot be

considered to be joint hindu property. Realising such a strange nature of the direction given by the trial Court in respect of the Yajmans the learned counsel appearing for the respondents (the plaintiffs) conceded that the said direction might also be set aside. The Division Bench, therefore, directed that the direction contained in clause (5) should be set aside. It is no-doubt true that moveable property is separately stated in clause (4) of the preliminary decree and the same has not been set aside. At the same time there has been a specific reference with regard to the Yajmans enlisted in the books of Yajmans and, therefore, if the Yajmans could not be divided, it would be strange to divide books of Yajmans and it would as well be strange to treat such books as moveable property. It is no-doubt true that the property which is not an immoveable property would be a moveable property. However, as said by the Division Bench surely the 'Yajmans' cannot be said to be property muchless moveable property. If that is so, books of Yajmans cannot be treated as moveable property. The only course open in respect of books of Yajmans would be to see that the respective parties have the list and particulars of Yajmans as reflected by all the books of Yajmans. This can be done by supplying xerox copies of such particulars from the books of Yajmans to the plaintiffs. The direction, therefore, with regard to books of Yajmans shall have to be set aside. Point no.2 will stand answered accordingly.

In the above view of the matter, the final decree passed by the learned trial Judge is hereby confirmed subject to setting aside the direction with regard to books of Yajmans and replacing such direction with the direction that the plaintiffs shall be supplied with the xerox copies and/or true copies of the particulars regarding Yajmans appearing in the books listed at item nos. 10-12 in the inventory, at the cost of the defendants nos. 1 and 2, who will then be handed over such books. The final decree will stand modified accordingly. This appeal is partly allowed in the above terms with no order as to cost.

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